Supreme Court, U. S.
FILED
DEC 24 1980
MICHAEL RODAK, JR., CLERK

80-1037

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

ALBERT RAYMOND SILVEY, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, State of California,
First Appellate District

GEORGE DEUKMEJIAN
Attorney General
of the State of California

ROBERT H. PHILIBOSIAN
Chief Assistant Attorney
General—Criminal Division

EDWARD P. O'BRIEN
Assistant Attorney General

JOHN T. MURPHY
Deputy Attorney General

RONALD E. NIVER
Deputy Attorney General
COUNSEL OF RECORD
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-2653
Attorneys for Petitioner

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F. CA 94111 • (415) 981-7662

QUESTION PRESENTED

May police conduct a warrantless search of a container found on a person who is the subject of a lawful custodial arrest?

TABLE OF CONTENTS

	Page
Question presented	1
Opinion below	1
Jurisdiction	2
Constitutional provision involved	2
Statement of the case	2
A. History of the case	2
B Statement of the facts	3
Reasons for granting the writ	5
Argument	7
Police may search containers found on the person of an arrestee as an incident to his arrest	7
Conclusion	15

PRECEDING PAGE WAS BLANK

TABLE OF AUTHORITIES CITED

Cases

	Page
Agnello v. United States, 269 U.S. 20 (1925)	8
Arkansas v. Sanders, 442 U.S. 753 (1979)	8
Brown v. State, 594 S.W.2d 86 (Tex.Cr.App. 1980)	10
Chimel v. California, 395 U.S. 752 (1969)	7, 8
Cupp v. Murphy, 412 U.S. 291 (1973)	8
Dawson v. State, 40 Md.App. 640, 395 A.2d 160 (1978)	10
Gustafson v. Florida, 44 U.S. 260 (1973)	13
Katz v. United States, 389 U.S. 347 (1967)	11
People v. DeSantis, 46 N.Y.2d 82, 385 N.E.2d 577, 412 N.Y.S.2d 838 (1978)	10, 12
People v. Flores, 100 Cal.App.3d 221, 160 Cal.Rptr. 839 (1980)	10
People v. Harris, 105 Cal.App.3d 204, 164 Cal.Rptr. 296 (1980)	9, 10
People v. Minjares, 24 Cal.3d 410, 591 P.2d 514, 153 Cal. Rptr. 224, cert. denied, 444 U.S. 887 (1979)	10
People v. Pace, 92 Cal.App.3d 199, 154 Cal.Rptr. 811 (1979)	10
People v. Redmond, 28 Ill.Dec. 774, 390 N.E.2d 1364 (1979)	10
Rakas v. Illinois, 439 U.S. 128 (1978)	11
United States v. Berry, 560 F.2d 861 (7th Cir. 1977)	9
United States v. Castro, 596 F.2d 674 (5th Cir. 1979)	9
United States v. Chadwick, 433 U.S. 1 (1977)	6, 7, 8, 9, 10, 11, 13
United States v. Edwards, 415 U.S. 800 (1974)	11, 12
United States v. Farrar, 470 F.Supp. 128 (S.D.Miss. 1979)	10
United States v. Garcia, 605 F.2d 349 (7th Cir. 1979)	9

Table of Authorities Cited

Cases

	Page
United States v. Gooch, 603 F.2d 122 (10th Cir. 1979)	13
United States v. Hernandez-Rojas, 420 F.Supp. 1212 (E.D.N.Y. 1979)	9
United States v. Janis, 428 U.S. 433 (1976)	14
United States v. Jimenez, 626 F.2d 39 (7th Cir. 1980)	13
United States v. Mackey, 626 F.2d 684 (9th Cir. 1980)	13
United States v. Robinson, 414 U.S. 218 (1973)	6, 8, 13, 14
United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978)	10
United States v. Wright, 577 F.2d 378 (6th Cir. 1978)	10
United States v. Ziller, 623 F.2d 562 (9th Cir. 1980)	9
Weeks v. United States, 232 U.S. 383 (1914)	8

Constitution

United States Constitution, Fourth Amendment 2, 8, 14

Rules

California Rules of Court:

- Rule 24(a) 2
- Rule 28(e) 2

Statutes

California Health and Safety Code, section 11378.5 2

California Penal Code:

- Section 995 3
- Section 1538.5 3

Title, 28, United States Code, section 1257(3) 2

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

ALBERT RAYMOND SILVEY, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, State of California, First Appellate District

The Petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue in this case to review the judgment of the California Court of Appeal, First Appellate District, which judgment was entered on September 5, 1980.

OPINION BELOW

The opinion of the Court of Appeal, which may be found at 110 Cal.App.3d 67, 167 Cal.Rptr. 566 (1980), appears as Appendix A to this petition. The order of the California Supreme Court on October 29, 1980, denying a petition for hearing, appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeal became final upon the denial of hearing by the California Supreme Court on October 29, 1980. Rules 24(a), 28(e), California Rules of Court. This petition for writ of certiorari was filed within 60 days of that date. Jurisdiction is conferred upon this Court by Title 28, United States Code, section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

A. History of the Case

After a preliminary hearing held in the San Leandro-Hayward Municipal Court on May 16, 1979, the Alameda County District Attorney filed an information in the Superior Court of that county charging respondent Albert Raymond Silvey, Jr., with possession for sale of PCP (Phencyclidine), in violation of Health and Safety Code section 11378.5 (CT 1).[1]

---

[1] "CT" designates the Clerk's Transcript on Appeal; "PHT" designates the Transcript of the Preliminary Hearing held on May 16, 1979.

On July 13, 1979, respondent moved to suppress evidence under Penal Code section 1538.5 and to dismiss the information under Penal Code section 995 (CT 5-9). The motion was granted on August 6 (CT 15).

Petitioner filed notice of appeal on August 9, 1979 (CT 17). On September 5, 1980, the Court of Appeal affirmed the judgment of dismissal. The California Supreme Court denied petitioner's application for a hearing on October 29, 1980.

B. Statement of the Facts

About 2:00 a.m. on March 27, 1979, Deputy David Barnhill of the Alameda County Sheriff's Department observed a 1964 Cadillac in the vicinity of Mission Boulevard and Grove Street in the City of Hayward. Barnhill followed the car because it appeared to be exceeding the speed limit. The officer determined that it was traveling at 45 miles per hour in a 35 miles per hour zone; in addition, it was weaving in its lane and drove over the raised dots of the center strip for 75 yards. Barnhill activated the emergency lights of his patrol car at A and Mission Streets, but the Cadillac did not stop until it had reached C and Mission Streets, one-half mile away (PHT 2-4, 26, 28).

Barnhill approached the driver, respondent Albert Raymond Silvey, Jr. As he did so, the deputy noticed a "roach clip," used to smoke marijuana cigarettes, protruding from the dashboard near the speedometer. Barnhill asked respondent for his driver's license; his movements while taking the license from his wallet were characterized by the officer as "slow and jerky" (PHT 5). Respondent,

who seemed to have little control over his movements, passed over his license several times. His joints were stiff, his eyes were droopy and bloodshot, cakes of saliva were at the corners of his mouth. While speaking with the officer, the respondent kept his face pointed toward the windshield and looked at Barnhill out of the corner of his eye, which fluttered back and forth. He hesitated in his responses to the officer's questions. These physical irregularities led Deputy Barnhill to conclude that respondent was under the influence of PCP (PHT 5-7, 27).

Barnhill testified that he had received training at the sheriff's academy and in the field for the recognition of drugs and paraphernalia. He was trained to recognize the symptoms of a person under the influence of PCP and had made six arrests for possession of that substance. According to Barnhill, a person under the influence of PCP will have bloodshot eyes with drooping lids. His movements will be "robotlike," and will be slow and spastic. His breath will emit an odor of medication rather than alcohol. His eyes will be nystagmic, that is, moving spasmodically from side to side (PHT 1-2; 17-20).

As respondent was stepping from the car, he took an object from the center armrest and stuck it into the back of his pants. Once respondent had left the car, Deputy Barnhill "retrieved the object" because "I didn't know what it was. I thought it may have been a weapon" (PHT 7-8). The deputy handed the container to his partner, handcuffed the respondent, arrested him for being under the influence of PCP, and placed him in the back seat of

the sheriff's car. Barnhill then returned to the front seat of the vehicle and opened the container, a Green Apple candy can (PHT 7-8, 29).

Inside the can were three white balls, three-fourths of an inch in diameter, wrapped in plastic, and a handrolled cigarette. Barnhill searched respondent and found a handrolled cigarette in his jacket pocket (PHT 9, 32). It was stipulated that the three white balls found in the can contained 2.53 grams of PCP and that the cigarette found in respondent's pocket contained an undetermined amount of the substance (PHT 36).

Deputy James Rose of the Alameda County Sheriff's Office, who had spent nine months in undercover narcotics investigations (PHT 38), was an instructor at the sheriff's academy (PHT 39), and had made 20 arrests for possession of PCP (PHT 40), testified that a person possessing more than a gram of PCP would have it for sale rather than personal use. He stated that 10 PCP cigarettes could be made from one gram of the substance (PHT 41). Rose believed that the 2.5 grams in respondent's possession had been intended for future sales (PHT 45) and were worth $375 (PHT 46).

On appeal from the order suppressing this evidence and dismissing the case, the Court of Appeal held that the Green Apple candy can should not have been searched without a warrant (Appendix A, pp. 3-5).

REASONS FOR GRANTING THE WRIT

The question presented by this case is whether police must seek a warrant to search a candy tin found on a

person under the influence of a drug or narcotic at the time of his arrest. Petitioner submits that when a person is validly arrested for the use of an illegal drug, he may be searched for a weapon or evidence of crime—typically, the substance which intoxicated him. If a container is found on his person, it may be searched for the drug. The search may be conducted without a warrant because the arrestee's expectation of privacy in containers on his person is not so intense at to require prior judicial approval for the inspection. Probable cause to arrest is sufficient. *United States v. Robinson,* 414 U.S. 218, 235 (1973), carefully states the prevailing rule:

> "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."

Nevertheless, the California court arrived at a conclusion which is a radical and unjustified departure from this governing principle as developed in this Court's cases. Relying upon *United States v. Chadwick,* 433 U.S. 1 (1977), the Court of Appeal held that, absent consent or exigent circumstances, police must have a warrant to search *any* container, no matter what its purpose is, or where it is found. But, we submit, the word "container" is not a talisman which magically and invariably creates a barrier

between police and objects which they need to inspect in the performance of their duties. Whatever the reach of the *Chadwick* rule, we believe that it was never intended to limit the scope of searches incident to a lawful arrest as delineated in *Chimel v. California,* 395 U.S. 752 (1969). The instant search, it is clear, would have been valid prior to *Chadwick;* nothing in *Chadwick* alters the conclusion about the reasonableness of the search.

The case is of nationwide importance because police in all jurisdictions must be informed of the extent to which they may search containers as an incident to an arrest. To the extent that courts in California, a state in which one-tenth of this nation's citizens reside, do not follow this Court's precedents they must be quickly corrected to permit California law enforcement authorities to discharge their duties properly. This case presents an ideal vehicle for the necessary correction.

ARGUMENT

POLICE MAY SEARCH CONTAINERS FOUND ON THE PERSON OF AN ARRESTEE AS AN INCIDENT TO HIS ARREST

Two terms ago, this Court observed:

> "Although the general principles applicable to claims of Fourth Amendment violations are well settled, litigation over requests for suppression of highly relevant evidence continues to occupy much of the attention of courts at all levels of the state and federal judiciary. Courts and law enforcement officials often find it difficult to discern the proper application of these principles to individual cases, because the circumstances giving rise to suppression requests can vary almost

> infinitely. Moreover, an apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment rights." *Arkansas v. Sanders,* 442 U.S. 753, 757 (1979).

But this case presents a situation, occurring with increasing frequency, in which the "general principles applicable to claims of Fourth Amendment violations" are not at all "well settled." More accurately, the California court concluded that previously settled principles had been drastically changed by this Court. If that conclusion goes uncorrected, then this Court's concern about increased "litigation over requests for suppression of highly relevant evidence" will prove to be an accurate prediction.

Specifically, this case involves the continuing validity of the principle that the person of an arrestee may be searched as an incident to a valid custodial arrest. The right to search an arrestee has been recognized since the birth of the Exclusionary Rule. *Weeks v. United States,* 232 U.S. 383, 392 (1914). This Court has continually reaffirmed this basic Fourth Amendment proposition. *E.g., Agnello v. United States,* 269 U.S. 20, 30 (1925); *Chimel v. California,* 395 U.S. 752, 762-763 (1969); *Cupp v. Murphy,* 412 U.S. 291, 295 (1973); *United States v. Robinson,* 414 U.S. 218 (1973). The question posed by this case, then, is whether this principle was altered or abridged by *United States v. Chadwick,* 433 U.S. 1 (1977).

In *Chadwick,* government agents arrested the defendants and seized from the trunk of their car a 200-pound double-locked footlocker which they searched in the police station one and one-half hours later. This Court declared that the

search was unreasonable, holding *inter alia,* that it was not incidental to the arrest. 433 U.S. at 14-15. After identifying the bases for warrantless searches incident to arrests—to safeguard the officers or others, and to prevent the loss of evidence (*id.* at 14)—this Court reaffirmed that "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest,' [citation omitted], or no exigency exists." *Id.* at 15.

This Court concluded: "Once law enforcement officers have reduced luggage or other personal property *not immediately associated with the person* of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident to that arrest." *Id.* at 15 (emphasis added; fn. omitted).

This Court in *Chadwick* did not intend to prohibit the warrantless search of all containers. As the above-quoted language clearly indicates, if the container is immediately associated with the person of the arrestee, it can be promptly searched as an incident to the arrest. Most cases have so construed the plain language of *Chadwick. United States v. Ziller,* 623 F.2d 562 (9th Cir. 1980); *United States v. Garcia,* 605 F.2d 349 (7th Cir. 1979); *United States v. Castro,* 596 F.2d 674, 677 (5th Cir. 1979); *United States v. Berry,* 560 F.2d 861, 864 (7th Cir. 1977) (dictum); *United States v. Hernandez-Rojas,* 420 F.Supp. 1212, 1221-1223 (E.D.N.Y. 1979); *People v. Harris,* 105 Cal.App.3d

204, 218, 164 Cal.Rptr. 296 (1980); *People v. Flores,* 100 Cal.App.3d 221, 232 & n.5, 160 Cal.Rptr. 839 (1980); *Dawson v. State,* 40 Md.App. 640, 395 A.2d 160, 164-167 (1978); *People v. DeSantis,* 46 N.Y.2d 82, 385 N.E.2d 577, 412 N.Y.S.2d 838 (1978). But a sizable minority of courts have concluded that containers, even those found in the possession of an arrestee, cannot be searched without a warrant. *United States v. Schleis,* 582 F.2d 1166, 1171-1172 (8th Cir. 1978); *United States v. Wright,* 577 F.2d 378, 381 n.2 (6th Cir. 1978) (dictum); *United States v. Farrar,* 470 F.Supp. 128, 131 (S.D.Miss. 1979); *People v. Minjares,* 24 Cal.3d 410, 419-420, 591 P.2d 514, 153 Cal.Rptr. 224, *cert. denied,* 444 U.S. 887 (1979); *People v. Pace,* 92 Cal.App.3d 199, 154 Cal.Rptr. 811 (1979); *People v. Redmond,* 28 Ill.Dec. 774, 390 N.E.2d 1364, 1370-1375 (1979); *Brown v. State,* 594 S.W.2d 86, 87 (Tex.Cr.App. 1980) (dictum).

In the present case, the lower court also refused to adhere to the plain meaning of *Chadwick,* declaring:

> "If property immediately associated with the arrestee's person is safely reduced to the officers' exclusive control, the danger that justifies the warrantless search no longer exists. The justification for warrantless searches of property immediately associated with the person, as well as of property not immediately associated with the person, is the danger that the arrestee may gain access to a weapon or contraband. If safe reduction of the latter type of property to the exclusive control of police officers necessitates the obtaining of a warrant by eliminating the justification for a warrantless search, no logical reason exists for treating the former type of property any differently." 110 Cal.App.3d at 70, 167 Cal.Rptr. at 568. (Appendix A, p. 4).

The flaw in the court's analysis is that it begins in the middle rather than at the beginning. The court's syllogism proceeds as follows: (1) The prosecution must justify a warrantless search with evidence of exigent circumstances. (2) Since the candy tin was in the possession of the officers at the time of the search, there were no exigent circumstances. (3) Therefore, the search was unreasonable and the evidence was properly suppressed.

The Court of Appeal failed to realize (or, more accurately, refused to accept) that the first, crucial step in the determination of the legality of a search is the inquiry: Did the subject of the search have an expectation of privacy in the target of the search so intense that a warrant was required? *Katz v. United States,* 389 U.S. 347, 351-353 (1967); *id.* at 361 (Harlan, J., concurring); *United States v. Chadwick, supra,* 433 U.S. at 12-13; *Rakas v. Illinois,* 439 U.S. 128 (1978). If there is no such expectation, then exigent circumstances may not be necessary to justify a warrantless search.

In the context of a search incidental to an arrest, the law is clear that probable cause to arrest dispenses with the necessity of seeking a warrant to search containers found on the arrestee. In *United States v. Edwards,* 415 U.S. 800 (1974), police seized and searched the clothing of an arrestee 10 hours after he had been arrested. This Court upheld the search, holding that "both the person and the property *in his immediate possession* may be searched at the station house after the arrest has occurred at another place and if evidence of crime is discovered, it may be

seized and admitted in evidence." *Id.* at 803 (emphasis added; fn. omitted).

The conceptual underpinning for this rule is that a lawful arrest of a person "does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence." *Id.* at 808-809. In short, a warrantless search was permissible not because of exigent circumstances—there were none (*id.* at 811 [Stewart, J., dissenting])—but because of a substantially reduced expectation of privacy in the arrestee's person and effects.

This principle was cogently explained in *People v. DeSantis, supra,* 46 N Y.2d at 87, 385 N.E.2d at 579, 412 N.Y.S.2d at 840:

> "But the practical impetus for allowing these searches lies in the fact that the arrest itself constitutes such a major intrusion into the privacy of the individual that the encroachment caused by a contemporaneous search of the arrestee and his possessions at hand is in reality *de minimus.* [Citations omitted.] Thus, when viewed in the context of reasonableness, the cornerstone in any Fourth Amendment inquiry [citation omitted], the lawful custodial arrest being reasonable [citation omitted], the search of the person and the area within his immediate control, in this instance defendant's suitcase, does not involve any greater reduction in the arrestee's expectation of privacy than that caused by the arrest itself."

In the instant case, the can was in respondent's "immediate possession" at the time of his arrest. Under *Edwards,* it could have been searched lawfully at the scene before or after respondent was handcuffed, or at the

station house after he had been booked and placed in a cell. The reason is that respondent's expectation of privacy if any, in the candy tin could not be so intense as to require a search warrant once he was arrested.

In the 20th year of the noble experiment known as the Exclusionary Rule, we have reached what must be close to the height (or nadir) of absurdity: Police must seek a warrant before searching a candy tin found on a man under lawful arrest for driving under the influence of an illegal drug. Respondent had no reasonable expectation of privacy in the candy tin; the police had cause—although under *Robinson* they did not need it—to believe that the tin contained contraband. The lower court's holding that a warrant was required is a misreading of *Chadwick* and a perversion of the Exclusionary Rule. We believe that *Chadwick* was intended to protect repositories of personal effects not associated with the person of the arrestee. Here, the container was not such a repository[2] (*cf. United States v. Mackey,* 626 F.2d 684, 687 [9th Cir. 1980]; *United States v. Jimenez,* 626 F.2d 39, 40-41 [7th Cir. 1980]; *United States v. Gooch,* 603 F.2d 122, 126-127 [10th Cir. 1979]); and, what is more important, it was located on an arrestee who no longer had any expectation of privacy in his person or immediate effects. *See United States v. Robinson, supra,* 414 U.S. at 237-238 (Powell, J., concurring).

---

[2]In *Robinson* and *Gustafson v. Florida,* 414 U.S. 260 (1973), the containers searched were cigarette packages. We do not perceive any difference of constitutional significance between a package of cigarettes and a candy tin. If the lower court is correct in its analysis, then it follows that *Chadwick* overruled *Robinson.* We do not believe that *Chadwick* was intended to have that result.

This case is an unjustifiable application of the Exclusionary Rule, which is intended to deter police misconduct, not to prevent law enforcement officers from performing legitimate functions. If the Rule is to perform its intended mission, a proposition by no means free from doubt (*e.g., United States v. Janis*, 428 U.S. 433, 447-454 [1976]), courts must not use it to achieve grotesque results such as those produced by the instant case.

We therefore submit that a writ of certiorari must issue in this case to permit this Court to reaffirm that not all containers are sacred receptacles, immune from police inspection. It must issue to permit police in this State to conduct proper searches incident to arrest, a right reaffirmed in *Robinson*. It must issue, in the last analysis, because the United States Constitution has been offended by the lower court's aberrant interpretation of the Fourth Amendment. There exists a compelling federal interest in the uniform construction of the Constitution. The deviation from, and distortion of, this Court's decisions by the lower court, and by other tribunals sharing its confusion, necessitate the exercise of correctional guidance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Dated: December 23, 1980

GEORGE DEUKMEJIAN
Attorney General
of the State of California

ROBERT H. PHILIBOSIAN
Chief Assistant Attorney
General—Criminal Division

EDWARD P. O'BRIEN
Assistant Attorney General

JOHN T. MURPHY
Deputy Attorney General

RONALD E. NIVER
Deputy Attorney General
Attorneys for Petitioner

(Appendices Follow)

APPENDIX

Appendix A

CERTIFIED FOR PUBLICATION

In the Court of Appeal of the State of California
First Appellate District, Division Four

1 Crim. 20111
(Superior Ct. No. H 1493)

The People of the State of California,
Plaintiff and Appellant,

vs.

Albert Raymond Silvey, Jr.,
Defendant and Respondent.

[Filed Sept. 5, 1980]

OPINION

After he had been held to answer at a preliminary examination, respondent Albert Raymond Silvey, Jr., was charged by information with possession of phencyclidine (PCP) for sale in violation of Health and Safety Code section 11378.5. He moved for an order setting aside the information, pursuant to Penal Code section 995, contending that PCP received in evidence at the preliminary examination had been unlawfully seized by a police officer. The court granted his motion and made an order dismissing the information. The People appeal from the order of dismissal.

The record of the preliminary examination supports the following recitals:

Alameda County Deputy Sheriff Barnhill stopped respondent on a highway for speeding and driving erratically. When the officer approached respondent's automobile, he saw a marijuana cigarette holder protruding from the dashboard. Respondent had difficulty removing his driver's license from his wallet, his movements were very slow and jerky, his eyes were droopy and bloodshot, and saliva was caked at the corners of his mouth. Deputy Barnhill inferred from respondent's appearance that he was under the influence of PCP and asked him to step out of the car.

Respondent leaned back in the seat, removed a metal container from the center armrest, and put it in the back of his pants. When he emerged from the car, Deputy Barnhill "retrieved" the container and handed it to his partner. The officer then arrested and handcuffed respondent, placed him in the back seat of the police vehicle, returned to the front seat of the vehicle, and opened the container. It contained 2.53 grams of PCP.

In moving to dismiss the information, respondent argued that the search of the metal container was unlawful because the search was warrantless and lacked probable cause. The Attorney General contends that the court erred when it granted the motion because Deputy Barnhill was authorized to search the container incident to respondent's arrest.

The United States Supreme Court narrowed the scope of a lawful warrantless search incident to arrest in *United States v. Chadwick* (1977) 433 U.S. 1, in which officers searched a 200-pound locked footlocker taken from the trunk

of an automobile after the defendants arrest and seizure of the vehicle. (*Id.*, at pp. 4-5). The court held that ". . . warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest' [citation], or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, *a search of that property is no longer an incident of the arrest.*" (Id., at p. 15 (emphasis added; fn. omitted].)

The Attorney General argues that *Chadwick* does not proscribe the warrantless search of property "immediately associated" with the arrestee at the time of his arrest. Respondent contends that *Chadwick* and its progeny[1] proscribe a warrantless search of a closed container which has been brought within the exclusive control of the police.

The Chadwick court distinguished between searches of the person incident to arrest and searches of "personal property not immediately associated with the person of the arrestee." The court held that, absent exigent circumstances, a search of the latter type requires a warrant. The rationale for this holding is equally applicable to a search incident to an arrest. The purpose of a search

---

[1]See *Arkansas v. Sanders* (1979) 442 U.S. 753; *People v. Dalton* (1979) 24 Cal.3d 850, cert. den. .... U.S. .... [63 L.Ed.2d 781, ... S.Ct. ....]; *People v. Minjares* (1979) 24 Cal.3d 410, cert. den. 444 U.S. 887.

incident to an arrest is to deprive a suspect of access to a weapon and prevent concealment or destruction of evidence. (*United States v. Chadwick, supra,* 433 U.S. 1 at p. 14.) If property immediately associated with the arrestee's person is safely reduced to the officers' exclusive control, the danger that justifies the warrantless search no longer exists. The justification for warrantless searches of property not immediately associated with the person, as well as of property not immediately associated with the person, is the danger that the arrestee may gain access to a weapon or contraband. If safe reduction of the latter type of property to the exclusive control of police officers necessitates the obtaining of a warrant by eliminating the justification for a warrantless search, no logical reason exists for treating the former type of property any differently.

In *People v. Minjares* (1979) 24 Cal.3d 410, the California Supreme Court held that the warrantless search of a zippered tote bag found in the trunk of the defendant's automobile, after his arrest, was unlawful for want of justifying exigent circumstances. The court also quoted the two sentences from *Chadwick* discussed above and stated: "It is clear from *Chadwick* itself that the tote bag would not have been subject to a warrantless search if appellant had been arrested on the street and the bag taken from his possession." (*People v. Minjares, supra,* at pp. 419-420.) It is unclear whether the court construed *Chadwick* as implicitly proscribing warrantless searches of closed containers immediately associated with the person of an arrestee in the absence of exigent circumstances, or whether the court considered the zippered tote bag not

to be immediately associated with the defendant. The former construction, however, would appear to be inevitable by way of consistent reasoning.

The warrantless search of respondent's metal container was accordingly unlawful, regardless of its relationship to respondent's person, because Deputy Barnhill had safely reduced it to his exclusive control.[2] The trial court did not err in granting respondent's motion.

The order of dismissal is affirmed.

CERTIFIED FOR PUBLICATION.

Rattigan, Acting P. J.

I concur:
Poché, J.

1 Crim. 20111

---

[2]The "accelerated booking search" theory advanced in the dissent was not raised below, the People have not urged it on their appeal, and the record does not support its application in any event.

People v. Silvey

1/Crim. 20111

I dissent.

Application of the doctrines discussed by the majority is somewhat clouded by the statement in *United States v. Chadwick* (1977) 433 U.S. 1, 15, that "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to arrest either if the 'search is remote in time or place from the arrest,' [citation] or no exigency exists." Taken out of context, this statement does suggest that *any* property seized from an arrestee and safely reduced to the exclusive control of police officers is outside the scope of a lawful warrantless incidental search. The context in which this statement appears, however, makes clear that the holding of *Chadwick* is not to be so broadly construed. The above quoted sentence is followed and explained by the statement that "luggage or other personal property *not immediately associated with the person of the arrestee*" is outside the scope of a search incident to arrest if safely reduced to the officer's exclusive control. (*Id.;* emphasis added.) Additionally, in the same paragraph the court stated the federal rule that warrantless searches of an arrestee's person and the area within his immediate control may be conducted without additional justification. (*Id.*, at pp. 14-15, citing *United States v. Robinson* (1973) 414 U.S. 218.)

The rule of *Chadwick* and its progeny is thus limited to searches of personal property not immediately associated with the person of the arrestee. The court in *Chadwick* re-

affirmed the viability of existing standards for searches of personal property that *is* immediately associated with the arrestee's person, i.e., searches of the person incident to arrest. Consistent with this view, the California Supreme Court in *People v. Minjares* (1979) 24 Cal.3d 410, cert. den. 444 U.S. 887, holding that the warrantless search of a zippered tote bag found in the defendant's car trunk after his arrest was unlawful for want to justifying exigent circumstances, quoted the two sentences from *Chadwick* discussed above and stated in dictum: "It is clear from Chadwick itself that the tote bag would not have been subject to a warrantless search if appellant had been arrested on the street and the bag taken from his possession." (*Id.*, at pp. 419-420.) The court perhaps considered that the zippered tote bag would not have been immediately associated with the defendant. The key question in the present case is thus whether respondent's metal container was immediately associated with his person at the time it was seized.

In fact, the metal container was removed from respondent's clothing; therefore it was without doubt immediately associated with his person. As one authority states, "A search is deemed to be 'of a person' if it involves an exploration into an individual's clothing, including a further search within small containers, such as wallets, cigarette boxes and the like, which are found in or about such clothing." (La Fave, Search and Seizure, vol, 2, § 5.5, at p. 347.) Thus, in *United States v. Robinson, supra,* 414 U.S. 218, at pp. 223, 236, a cigarette package found in the arrestee's coat pocket was within the scope of a lawful incidental search of the person. By contrast, a search of items which

"do not have this intimate a connection with a person" requires a warrant or exigent circumstances justifying the warrantless search. (La Fave, Search and Seizure, vol. 2, § 5.5, at p. 347.) The legality of the search of respondent's metal container is therefore to be determined according to standards for searches of the person incident to arrest.

Under federal law a full search of the person incident to a lawful custodial arrest requires no justification other than the arrest: the full search of the person "is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." (United States v. Robinson, *supra,* 414 U.S. 218, 235.) California courts, however, have adhered to more stringent, independent state standards. (Cal. Const., art. I, § 13.) The California Supreme Court has determined the permissible scope of full searches of arrestees according to "the possible disposition of the arrest, i.e., whether the arrestee is to be cited and immediately released, or taken before a magistrate or other official and given the opportunity to post bail, or booked and incarcerated. . . . [A] full body search is impermissible when the person is arrested for an offense for which he will merely be cited or released on bail." (People v. Maher (1976) 17 Cal.3d 196, 199.) Thus, the California Supreme Court has prohibited full body searches incident to the arrest of persons for public inebriation (Pen. Code, § 647, subd. (f)) because an empirical study of law enforcement practices revealed that release of the public inebriate without incarceration is a readily available and sometimes standard practice. (People v. Longwill (1975) 14 Cal.3d 943, 946-948.) If, however, the arrestee is to be booked and incarcerated, a full

search is permissible as an "accelerated booking search." Because a full custody search would be permissible at the station house prior to booking, a full search in the field would not be a significantly greater intrusion. (People v. Barajas (1978) 81 Cal.App.3d 999, 1008-1009; see People v. Maher, *supra,* 17 Cal.3d at p. 199; People v. Longwill, *supra,* 14 Cal.3d 943, 948.)

Where a court is not presented with helpful empirical data, it may be difficult to determine the likelihood that the suspect will be booked and incarcerated. Courts of Appeal have found a likelihood of booking and incarceration on the basis that the offense for which the person was arrested was a felony (People v. Barajas, *supra,* 81 Cal.App.3d 999, 1009), that the sentence prescribed for the offense was severe (People v. Rich (1977) 72 Cal.App.3d 115, 126 [mandatory 90-day jail sentence for possession of specified controlled substances (Health & Saf. Code, § 11550]), or that booking and incarceration were necessary to insure the availability of vital evidence such as could be obtained by urine or other appropriate tests. (*Id.*)

After Deputy Barnhill stopped respondent's automobile, he determined that respondent was under the influence of PCP and arrested him. Driving a vehicle under the influence of a drug is not a felony (Veh. Code, § 23102), but the punishment is relatively severe: a first offender is punishable, inter alia, by imprisonment for not less than 48 hours. (Cf. People v. Knutson (1976) 60 Cal.App.3d 856, 867 [upholding warrantless search of person arrested for being under the influence of PCP in a public place].) Release of the offender without booking and incarceration furthermore could jeopardize the obtaining of scientific evidence

of the offense. It is thus to be concluded that respondent was thus subject to a lawful warrantless "accelerated booking search" incident to his arrest.

The search of respondent's metal container was within the scope of a lawful accelerated booking search, because the container would have been subject to examination when respondent was booked. Prior to *Chadwick* and its progeny, several decisions held that booking officers may search an arrestee and his personal effects to prevent weapons and contraband from being brought into the jail. (See, e.g., People v. Ross (1967) 67 Cal.2d 64, 70, revd. on other grounds, 391 U.S. 470; People v. Gilliam (1974) 41 Cal. App.3d 181, 189; People v. Rogers (1966) 241 Cal.App.2d 384, 389-390.) One post-*Chadwick* decision reiterated: "When a person has been lawfully arrested on a criminal charge and undergoes the process of 'booking' at a police station prior to being held in jail, it is reasonable to conduct a search of his person and effects for the purpose of preventing the introduction of weapons or contraband into the jail." (In re John C. (1978) 80 Cal.App.3d 814, 820 [upholding booking search of tinfoil packet found by arresting officers in a small package of cigarette papers]; see also People v. Barajas, *supra*, 81 Cal.App.3d at p. 1009.) Several recent decisions have held that *Chadwick* and its progeny do not alter this rule. (People v. Harris (1980) 105 Cal.App.3d 204, 216-217; People v. Bullwinkle (1980) 105 Cal.App.3d 82, 86-87, hearing den. June 25, 1980.)

The order of dismissal should be reversed.

Christian, J.

Appendix B

Order Denying Hearing
After Judgment By The Court Of Appeal

1st District, Division 4, Crim. No. 20111

In The Supreme Court
Of The
State Of California
In Bank

[Filed Oct. 29, 1980]

People

v.

Silvey, Jr.

Appellant's petition for hearing DENIED.

Clark, J., and Richardson, J., are of the opinion that the petition should be granted.

/s/ BIRD
Chief Justice